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No. 99-1871

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In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE CHIPPEWA CREE TRIBE OF THE ROCKY BOYS' RESERVATION, THE KLAMATH TRIBES, THE TULE RIVER TRIBE, THE NEZ PERCE TRIBE, ET AL. IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

The Klamath Tribes, working closely with their federal trustee to protect their water resources, exchanged documents with the United States Department of the Interior about these trust resources. Notwithstanding the trust nature of the communications, the United States Court of Appeals for the Ninth Circuit held that these documents were subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1994) [hereinafter FOIA].

*Amici Curiae* are seventy-five federally recognized Indian tribes, one Indian water rights coalition, one intertribal council, and one national Indian organization. All *amici* tribes have trust resources and routinely find themselves in the same position as the Klamath Tribes. *Amici* tribes are not in sole possession of their trust resources; title is held by the United States in a trusteeship that has been defined by over 150 years of this Court's unique jurisprudence regarding federal-tribal relations. *Amici* tribes must give information to their trustee to ensure their rights and have a longstanding and substantial interest in having these communications remain confidential. Under the Court of Appeals' opinion, however, if tribes share crucial information with the United States, that information is subject to disclosure under FOIA, no matter how confidential. *Amici* thus have a substantial interest in having the United States Supreme Court review and reverse this potentially devastating decision.

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals held that the United States must, under FOIA, disclose sensitive documents exchanged between the federal government and the Klamath Tribes regarding tribal trust resources – in this case, federally reserved tribal water rights. The documents at issue were created to aid in the government's filing of water rights claims on behalf of the Tribes in a state water rights adjudication and to aid in the government's preparation of a long-term water management plan for the Klamath River Basin.

*Amici* argue herein that under principles articulated by this Court, FOIA does not apply to the federal-Indian trust relationship at issue. Alternatively, the communications here fit within Exemption 5 of FOIA, which states that "[t]his section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency. . . . " 5 U.S.C. § 552(b)(5).

Traditionally, courts have applied what has been coined the "functional test" for determining whether Exemption 5 protects from disclosure documents created by outside consultants. *See Texas v. Interstate Commerce Comm'n*, 889 F.2d 59, 61 (5th Cir. 1989), (*citing Hoover v. United States Dep't of Interior*, 611 F.2d 1132 (5th Cir. 1980). Under this test, courts analyze the nature of the communications at issue to determine the role they play in agency determinations. Where the communications play a consultive role, or aid in an agency's deliberations, they are protected from disclosure under Exemption 5, even where the entity creating the documents is not a government



agency. *See Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) (exempting communications of former president); *Wu v. Nat'l Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972) (exempting communications of professors of Chinese history); *Formaldehyde Inst. v. Dept. of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989) (exempting letter by review panel for scholarly journal); *Hoover v. United States Dept. of Interior*, 611 F.2d 1132 (5th Cir. 1980) (exempting appraisers report); *Ryan v. Dept. of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (exempting communications by United States Senators).

The Court of Appeals went beyond existing FOIA law to create a new test to determine that the documents here were not exempt under Exemption 5. Rather than looking to the role the documents played in agency deliberations pursuant to the trust relationship, the Court of Appeals held that the Tribes' *interest* in the subject matter of the communications mandated disclosure. On this point, the court noted that "the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations." *See* Petition at App. 8a. Based on this reasoning, the court held that the documents at issue must be disclosed under FOIA.

The Court of Appeals' holding that such communications are subject to disclosure under FOIA will have a broad and damaging impact on the federal trust relationship and on tribes nationwide.[2] As all tribes have a

[2] As the United States' Petition points out, the Ninth Circuit's opinion directly impacts 400 of the 556 federally

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"direct interest" in their tribal resources, the court below has essentially created a rule of universal application to Indian tribes. Such a rule will put tribes to a Hobson's choice: either they must cease full communication with their trustee about their trust resources, thereby forcing the United States to carry out its trust blindly, without the experience, expertise, and goals of the tribes – or they must run the risk that all such communications will be subject to public disclosure on demand, even where such disclosure would be damaging to the tribe, would amount to a breach of the United States' trust duty, and would otherwise be protected from discovery in litigation.

*Amici* urge this Court to grant the United States' Petition for a Writ of *Certiorari* because of the extreme importance of this case to Indian tribes and their trust resources. The decision allowing FOIA to work a sea of change in the historic relationship between the United States and tribes should come from no less an authority than this Court – the institution that has been supremely influential in defining the federal-tribal relationship. Given the magnitude of the decision's impact, coupled with the Court's central, critical role in developing the unique jurisprudence of the United States' relationship with Indian tribes, *Amici* urge this Court to grant the United States' Petition for a Writ of *Certiorari*.

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recognized tribes and 28 million out of 45.5 million acres of trust land. Petition at 27. Additionally, though not directly impacting tribes and land in other circuits, the opinion will have a chilling effect on shared communications between those tribes and the United States due to the uncertainty cast by the Ninth Circuit's opinion that those communications will remain confidential.



## ARGUMENT

### I. THIS CASE MERITS REVIEW BY THIS COURT BECAUSE OF ITS IMPORTANCE

#### A. The Impact Of The Court Of Appeals' Decision Will Be Widespread And Potentially Disastrous For Tribes

All tribes rely on the United States in its fiduciary capacity with respect to tribal resources. Tribes are not in sole possession and control of their trust resources because the United States holds the legal title to those resources, as in the instant case. Thus, to protect their resources – especially those coveted by third parties – tribes must work with the United States.[3]

In some instances, tribes rely on the United States to bring suit on their behalf, to respond to suits brought by others, or to represent their interests in settlement negotiations or administrative proceedings involving those

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[3] As the Eleventh Amendment precludes tribes from suing states absent waiver of sovereign immunity by the state, often tribes have no choice but to depend on the United States to assert tribal interests where a state is involved. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (noting that although Congress may not use its powers under the Commerce Clause to abrogate state sovereign immunity to suit by tribes, the United States may bring suit against state). *See also, Arizona v. San Carlos Apache Tribe*, 463 U.S. 546, 565 (1983) (United States argued that it was "unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in state proceedings and relying on the United States to represent their interests in state court.")

resources. The area of water rights alone provides a powerful example. Nearly fifty tribes and pueblos are currently in litigation or negotiation to establish or implement tribal water rights. In each of these cases, the United States is participating in its capacity as fiduciary. At present, the United States has assigned thirty-six federal negotiating teams to work directly with tribes in settling issues of tribal water rights, and each year the United States dedicates tens of millions of dollars towards pursuing water rights claims for tribes. *See Working Group on Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (1990).

Resolution of water rights issues involves years of cooperative work between tribes and the United States. For instance, the Klamath Tribes themselves have been working with the United States regarding their water rights since at least 1987, and certain Pueblos since the 1970's. These tribes have already shared information with their fiduciary with the understanding that such information, including information about case strengths and weaknesses, would be confidential. Many tribes, like the Klamath Tribes, have entered into memoranda of understanding with the United States regarding the sharing of data relevant to those proceedings, including work performed by the tribes to aid the United States in fulfilling its trust responsibilities. Under the Court of Appeals' decision, however, shared information, no matter how damaging to the protection of the tribes' resources, is subject to disclosure. It is even subject to disclosure to adversaries in litigation, as is the case here.



Allowing such disclosure of private tribal information is deeply destructive of the federal trust because tribes will be put to an unfair choice between sharing vital information with their trustee about trust resources, or withholding that information and severely undermining the ability of the United States to act as fiduciary. Moreover, allowing this disclosure sharply tilts litigation and settlement negotiations in favor of non-Indians competing with tribes for limited resources. While the public is granted access to confidential tribal-federal communications, tribes have no corresponding access to confidential information shared by opposing parties with their representatives and attorneys.

Further, by hamstringing a tribe's ability to confidentially communicate with its trustee, the decision below will affect the willingness and ability of tribes and the federal government to participate in water adjudications and settlement negotiations. This decision will increase the time and cost of both negotiation and litigation by requiring the United States to duplicate any investigation of tribal water rights claims that might be sensitive, even though years and hundreds of thousands of dollars may have already been spent by the tribe to collect the information. This result will harm not only tribes but all interests seeking to resolve water rights – including states and local water users.

### B. The Court Of Appeals' Decision Undermines The Trust Relationship Between Tribes And The United States That Has Been Developed And Confirmed By This Court

The federal Indian trust relationship is a cornerstone of federal Indian law and is a unique relationship that has

long been recognized by this Court, Congress, and the Executive Branch. *See United States v. Kagama*, 118 U.S. 375, 384 (1886); *Nat'l Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). The foundation of this trust relationship traces to the first cessions of land by tribes to the federal government and the mutual promises guaranteed through treaties accomplishing those cessions. In exchange for the tribes' relinquishment of vast tracts of land, the United States "undertook the obligation to insure the survival of tribes" on remaining tribal homelands or reservations. *See* American Indian Policy Review Comm'n, 94th Cong., Final Report 126 (Comm. Print 1977) [hereinafter *Comm'n Final Report*].

The trust relationship continued to evolve through judicial opinion of this Court. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes are "domestic dependent nations [that exist] . . . in a state of pupilage" and that their relationship with the United States "resembles that of a ward to his guardian."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) ("[t]his relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving the protection of one more powerful"); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (stating that "from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection. . . . ").

The Court has steadfastly recognized and reinforced the trust relationship between the United States and Indian tribes, particularly where trust resources, such as those at issue here, are involved. As this Court has clearly



held, where the United States takes comprehensive control over Indian trust property, the United States must act as trustee to that property.[4] *United States v. Mitchell*, 463 U.S. 206 (1983) [hereinafter *Mitchell II*]. As this Court stated in *Mitchell II*:

> [A] fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber lands and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

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[4] As a result of the General Allotment Act of 1887, codified as amended at 25 U.S.C. §§ 331-358 (1994), the United States became trustee over an enormous range of Indian resources. An equally broad range of statutes and regulations has given the federal government comprehensive control over Indian assets and activities related to them – oil and gas, minerals development, sale of timber and forest management, grazing and farming, as well as the proceeds generated from such resources which it must collect, manage, invest, and disburse to the beneficial owners of the land. *See, e.g., Cobell v. Babbitt*, 91 F. Supp.2d 1, 24 (D.D.C. 1999). The United States is also trustee over tribal water resources. *See Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (Cl. Ct. 1991) (holding that the United States was required under its trust responsibility to defend tribes' water rights).

*Mitchell II* at 225, *quoting Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980) (footnote omitted). The requisite level of federal control is plainly present in this case because the trusteeship causes the United States to represent the Klamath Tribes' water rights in the Klamath Basin Adjudication *whether the Tribes agree to that representation or not. See, e.g. Arizona v. San Carlos Apache Tribe*, 463 U.S. 546, 565 n.17 (1983) (observing that "any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians."); *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) (despite tribal opposition, the United States was required by trusteeship to represent tribal water rights in state adjudication).

Under the trust relationship, the United States "has charged itself with moral obligations of the highest responsibility and trust" to protect tribal lands, assets, resources, and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The standard to which the United States is held in carrying out its fiduciary duties is informed by traditional trust law doctrine. *United States v. Mason*, 412 U.S. 391, 398 (1973) (*citing* 2A Scott, Trusts 1408 (3d ed. 1967) and stating that the United States has a duty "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"); *see also Comm'n Final Report* at 128 (stating that the federal government "must act with good faith and utter loyalty to the best interests of the beneficiary"). In this case, the pertinent principle of trust law is that a trustee is required to maintain the confidentiality of the information gained pursuant to the trust relationship when disclosure would be detrimental to the interest of the



beneficiary. Restatement (Second) of Trusts § 170 cmt. s (1959).

Despite this long and strong legal foundation, the Court of Appeals' decision allows the disclosure of sensitive communications from and to the Klamath Tribes regarding their trust resources in legal and administrative proceedings which affect those resources. In so doing, the lower court undermines the trust relationship and hence the entire body of law upon which this Court has founded federal-Indian relations. Because this case goes to the very heart of the United States' relationship with Indian tribes, whether such an outcome should stand – and it should not – is a question that requires this Court's review.

## II. THE COURT OF APPEALS ERRED BY IGNORING THE UNIQUE FEDERAL-TRIBAL TRUST RELATIONSHIP IN DETERMINING WHETHER THE DOCUMENTS AT ISSUE ARE SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

In reaching its decision, the Court of Appeals gave no weight to the uniqueness and content of the trust relationship between the United States and Indian tribes. The court analyzed the case as though the Klamath Tribes were not the subject of a federal trusteeship but, instead, were just like any other party submitting documents to a government agency. But tribes are not like other parties. Rather, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). These distinctions must be considered to

determine whether FOIA applies to the communications at issue. By taking the trust relationship into account, it is clear that the documents are not subject to disclosure under FOIA.

### A. The Freedom Of Information Act Does Not Apply Where Confidential Documents Are Exchanged Between Indian Tribes And The United States About Tribal Trust Resources

It is a well-established principle of statutory construction that courts must presume that Congress does not intend to abrogate Indian rights when it passes general laws unless it specifically considers those rights. *United States v. Dion*, 476 U.S. 734 (1986). As this Court held in *Dion*:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. *Cohen* 223; *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . . " *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S., at 412, 88 S.Ct., at 1711; in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Id.*, at 413, 88 S.Ct., at 1711, *quoting Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934). Indian treaty rights are too fundamental to be easily cast aside.



*Dion*, 476 U.S. at 738-739 (footnote omitted). The rule articulated by this Court in *Dion* is that in order to find that a statute of general applicability abrogates a tribal right, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. Indeed, as the Ninth Circuit itself previously has held, when interpreting statutes, courts must "presume[ ] that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1117 (9th Cir. 1985) (*citing United States v. Farris*, 624 F.2d 890, 893 (1980)).

As explained above, the trust relationship is rooted in treaty and other federal commitments. *See* discussion *supra* p. 8. And, unmistakably, the rights of the Klamath Tribes are treaty-based. *See United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir. 1983) (stating that the Klamath Tribes' right to water is a treaty-based right). Confidential communications are a necessary component of the trust relationship. To carry out its duties as trustee with respect to Indian trust property, the federal government must necessarily consult with Indian tribes on many complex issues regarding the establishment, management, and protection of such property. Such consultation has been mandated

by the President,[5] the Department of the Interior,[6] Congress,[7] and the courts.[8] Common sense also dictates that open communication between trustee and beneficiary is vital to managing and protecting the trust corpus. Indian tribes often know their resources far better than federal officials perhaps located, as in the Klamath Tribes' case, hundreds of miles away.

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[5] *See* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998) (requiring regular and meaningful consultation with tribal governments on a government-to-government basis to address issues concerning tribal trust resources); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996) (requiring federal agencies to accommodate access to and ceremonial use of Indian sacred sites and avoid adversely affecting their physical integrity).

[6] *See* Department of the Interior Departmental Manual, Pt 512 § 2.2 (1995) (requiring all agencies within the Department of the Interior to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources and providing confidentiality assurances).

[7] *See* 25 U.S.C. § 162a(d)(8) (Supp. 2000) (requiring Secretary of Interior to "appropriately manage the natural resources located within the boundaries of Indian reservations and trust lands."); 25 U.S.C. § 3601(2) (Supp. 2000) (stating that United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government); 2 U.S.C. § 1534(a) (1994) (requiring federal agencies to develop an effective process to permit tribal officers to provide meaningful and timely input in development of regulatory proposals).

[8] *See Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *7-8 (D. Or. Oct. 2, 1996) (discussing procedural duty that arises from trust relationship such that the federal government must consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources).



If Congress had intended the extraordinary result of eviscerating the trust relationship by making sensitive trust communications public, it would have been required to make its intent "clear," "plain," or manifest in the language or legislative history. *Dion*, 476 U.S. at 738-740. As nothing in the language of FOIA or its legislative history suggests that Congress intended to abrogate tribal rights to the fiduciary relationship with the United States, the rights of the Klamath Tribes to confidential communications in the context of this relationship remain intact.

As the question here is whether FOIA abrogates tribal rights to the trust relationship, the court was bound to consider that relationship in its analysis, which it did not do. Proper analysis leads to the conclusion that Congress did not intend through FOIA to abrogate that relationship. *Amici* respectfully urge this Court to grant the United States Petition for a Writ of *Certiorari* to afford proper consideration of this question and to reverse the lower court's error.

### B. Exemption 5 Of The Freedom Of Information Act Shields Confidential Communications Between Tribes And The United States About Tribal Trust Resources

Assuming, *arguendo*, that FOIA does apply in the instant situation, the failure of the court below to consider the trusteeship led it to the incorrect conclusion that Exemption 5 does not protect the documents from disclosure.

The United States' Petition sets out and discusses the current state of the law surrounding FOIA Exemption 5 and the "functional test" under which the proper judicial inquiry is into the role and function of the document in the agency's decision making process. Petition at 4-6 and 19-22. That discussion will not be repeated here. The point deserving emphasis here is the degree to which the departure by the court below from this established precedent – and the new "interest test" created by that court for purposes of Exemption 5 analysis – is inconsistent with the trusteeship obligations assumed by the United States pursuant to this Court's jurisprudence.

In reaching its decision, the majority of the court below hinged its opinion on the fact that the Klamath Tribes have an interest in the water resources under scrutiny. Citing *Skokomish Indian Tribe v. Federal Energy Regulatory Commission*, 121 F.3d 1303, 1308 (9th Cir. 1997), the court reasoned that the agency should not "afford [the Klamath Tribes] greater rights" than other parties "under the regulatory scheme." Petition at App. 10a. The lower court misapprehended the issue, however. The point here is not to afford the Klamath Tribes greater rights but to determine whether Exemption 5 shields documents exchanged between the United States and tribes about tribal trust resources within the context of the federal-tribal trust relationship.[9] As the United States properly

[9] This case concerns the situation where the United States is acting as a trustee and where the communications between the trustee an the beneficiary tribes are sensitive documents that directly concern the tribal trust resource, or trust corpus. It is thus unlike *County of Madison, New York v. Dep't of Justice*, 641 F.2d 1036 (1st Cir. 1981), where the United States was not acting as tribal trustee but stood in the position of adversary, and *Indian Law Resource Ctr. v. United States Dep't of Interior*, 477 F. Supp. 144 (D.D.C. 1979), where non-sensitive documents were subject to disclosure.



explains, had the lower court considered the role of the documents and the trust relationship, it would have found the documents exempt from disclosure under Exemption 5. *See* Petition at 14-28.

By ignoring the broader context of the trust relationship, the opinion below results in what the United States appropriately terms a "perverse" analysis in which the very interest that creates the federal trusteeship serves as the agent that destroys the confidentiality – and, thus, the soul – of the trusteeship. *See* Petition at 20. Through this perversion, the court has rendered the trust relationship a threat rather than a protection for tribes. Such a profound and incorrect result warrants review and reversal by this Court.

## CONCLUSION

The Ninth Circuit's decision drastically alters the historic federal-tribal trust relationship and undermines the federal trust duty to manage and protect tribal resources. Because of the devastating impact this case will have on the federal trust relationship, a relationship this Court has been overwhelmingly influential in defining, this case merits review by this Court. The Supreme Court should be the final arbiter of whether the Ninth Circuit's interpretation and application of FOIA fits

within the cosmos of cases with which it has defined federal-tribal relations. For these reasons, *Amici* respectfully request this Court to grant the United States' Petition for a Writ of *Certiorari* and reverse the Ninth Circuit decision on this issue.

Respectfully submitted,

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